ST 95-24
Tax Type: SALES TAX
Issue: Tangible Personal Property Purchased By Taxpayer For Rental Purposes

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
SPRINGFIELD, ILLINOIS

THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS	)	Docket #
v.	)	IBT #
XXXXX	)	
	)	Karl W. Betz
	)	Administrative Law Judge
Taxpayer	)	

RECOMMENDATION FOR DISPOSITION

APPEARANCES XXXXX, for XXXXX.

SYNOPSIS This cause came on to be heard following a Retailers' Occupation/Use Tax audit performed by the Illinois Department of Revenue (hereinafter the "Department") upon XXXXX (hereinafter the "Taxpayer"). As Taxpayer did not agree with the proposed liability determined by the Department, an assessment was issued whose timely protest by Taxpayer culminated in this contested case. At hearing, Taxpayer contested certain findings made by the Department auditor after an audit of the company's books and records for the period of February 1987 through October 1989. The major portion of the liability established by the auditor was use tax upon items of tangible personal property purchased by Taxpayer for rental purposes. A minor amount of liability was assessed on purchases of supplies Taxpayer had made without paying tax. At hearing, the Taxpayer primarily focused on the Use Tax assessed on their purchase of rental items.

The issues raised by Taxpayer are that there were misunderstandings in its industry to the extent that assessment of the tax here is violative of

constitutional equal protection and due process provisions. Taxpayer also contends it should be allowed a credit for Retailers' Occupation Tax it collected on its rental receipts.

After reviewing the complete transcript of record including all documents admitted therein, I recommend the issues be resolved in favor of the Department and the liability be upheld.

FINDINGS OF FACT

1. Taxpayer conducted business operations in Illinois during the audit period by renting and selling various items of tangible personal property such as appliances and furniture. (Dept. Ex. No. 2).

2. The major portion of Taxpayer's revenues were rental receipts from its leasing of tangible personal property. A small part of its receipts were from the retail sale of tangible personal property. (Tr. pp. 48-49; Dept. Ex. No. 2).

3. The rental contract taxpayer used in its business does not have an option to purchase for a nominal amount and it does not require its lessee customer to buy the item being leased. (Dept. Ex. No. 2 pp. 52, 73-76).

4. Pursuant to statutory authority, the auditor did cause to be issued a Correction of Returns and this served as the basis for Notice of Tax Liability (NTL) No. XXXXX issued by the Department on June 14, 1990 for $89,440.00 tax plus statutory interest and penalty. (Dept. Ex. Nos. 1 and 3).

5. Taxpayer submitted no letter ruling or other written opinion issued by the Department stating Taxpayer was to collect and remit tax on rental receipts. (Tr. pp. 3, 72; Dept. Ex. No. 2).

CONCLUSIONS OF LAW A tax is imposed upon the privilege of using tangible personal property in Illinois. Ill. Rev. Stat. ch. 120, par. 439.31 The word "use" is defined in the Use Tax Act as the exercise of

ownership power over tangible personal property such as the merchandise Taxpayer rented in the instant case. Ill. Rev. Stat. ch. 120, pars. 439.2 and 439.3

Taxpayer offered evidence regarding the tax collection and reporting practices of other rental businesses as support for its argument that the Department's administration of the Retailers' Occupation and Use Tax Acts in regards to Taxpayer violated its constitutional equal protection and due process rights.

I do not find this argument persuasive because the tax collection practices of other businesses are not relevant to the liability established against Taxpayer herein, and I therefore will not consider it in determining if Taxpayer has overcome the prima facie case of the Department, which consists of the introduction of its corrected return into the record. (Dept. Ex. No. 1). The possibility that another business may also have been collecting and filing its taxes incorrectly does not absolve Taxpayer from its failure to pay taxes correctly.

Mr. XXXXX, Taxpayer President, testified that approximately 95% of his revenues were from rental receipts (Tr. pp. 48-49) and this was confirmed by Mr. Arthur Harder, Department auditor, whose testimony and audit calculations coincided with this approximate percentage amount (Tr. pp 35-38; Dept. Ex. No. 2, pp. 46-49). Mr. Harder testified further that he only assessed Use Tax on the items Taxpayer rented but did not sell. (Tr. p. 34-35).

Taxpayer, as a lessor, was a user of the merchandise he leased (Philco v. Department of Revenue 40 Ill. 2d 312, 1968) and the U.S. Supreme Court has noted the legality of the Illinois Use Tax. United Air Lines v. Mahin 410 U.S. 623

The Department delineated the rule that lessors owe use tax upon purchases of rental property in its regulations (86 Admin. Code ch. I,

Secs. 130.220 and 150.305 (e)) and further specified in another regulation (86 Admin. Code ch. I, Sec. 130.2010) that the "lease" of tangible personal property under an agreement containing an option to purchase for $1.00 or other nominal amount was actually a conditional sale from the outset whose total receipts are subject to Retailers' Occupation Tax. Illinois case law has also provided guidance upon the difference between true leases and conditional sales. Arco Bag Company v. Facings, Inc. 18 Ill. App. 2d 110 (1958)

Against this background of considerable authority that exists in the area, I find Taxpayer's argument that it was nearly impossible for it to determine its tax responsibilities (Taxpayer Brief, p. 4) to be without merit. Because Taxpayer's leases were true leases and not conditional sales, it incurred Illinois Use Tax liability on its purchase of merchandise for the purpose of leasing. As Mr. Harder stressed in his testimony, a taxpayer who has a question on their tax responsibilities in the rental area should submit it to the Department's legal division for a written ruling.

In this hearing Taxpayer instead attempts to rely upon alleged oral advice given to it by a Department employee, one "Barthelme", that it was supposed to collect tax upon its rental receipts. In light of Department Regulations and Taxpayer Ex. No. 5, I attach no weight to this. First, it is inherently suspect because of its self-serving nature. Also, my examination of Taxpayer Exhibit No. 5, which is a copy of notes supposedly taken by Vice-President XXXXX during this conversation with "XXXXX" (Tr. pp. 62-63), shows that statements thereon are not consistent with the alleged incorrect verbal advice but actually correctly state the law. For example the first two statements:

"Sales Tax due on full amt-including rental

Tx not due until purchase then it is due on full amt pd in on item"

are consistent with the rule that under a conditional sales contract all payments are subject to ROT even if they are called "rental".

The final two statements on Taxpayer Ex. No. 5, which are:

"[NO USE TX DUE]

Items purchased for resale"

are consistent with the rule that tax is not due upon items when they are purchased for the purpose of resale. Under Department regulation 130.505 (86 Admin. Code ch. I, Sec. 130.505) entitled "Returns and How to Prepare", it is stated:

> "Returns shall be filed on forms prescribed and furnished by the Department. It is the duty of the taxpayer to obtain forms, and failure to obtain them will not be an excuse for failure to file returns when and as required by law.

This Retailers' Occupation Tax rule has been incorporated by reference into the regulations that govern the Use Tax. See 86 Admin. Code ch. I, Secs. 150.910 and 150.1201. It means that a taxpayer is under a legal duty to file Retailers' Occupation and Use Tax returns according to the requirements of Illinois law. Failure to obtain the returns or file the correct taxes thereon is not a valid reason to excuse a taxpayer from its responsibilities.

Simply seeking oral or verbal advice is not sufficient to satisfy a taxpayer's tax collection or payment responsibilities, as Subpart J of Department regulations (86 Admin. Code ch. I, Sec. 130.1001) that was in effect during the audit period, entitled "Binding Opinions" stated as follows:

Section 130.1001 When Opinions from the Department are Binding.

a) Taxpayers must not rely on verbal opinions from Department employees, but will be protected only if the opinion from the Department is in writing. Even then, the opinion ceases to have any effect if the law is changed in any pertinent respect by the General Assembly, or if a pertinent change in the interpretation of the law is made by a Court decision or by some change in the Department's regulations, whether such change is accomplished by means of a new regulation or by

means of a revision of an existing regulation.

b) The Department may also rescind outstanding written opinions or rulings issued prior to any given specified date by issuing a bulletin or some other form of general public notice to that effect.

c) As used herein, "Regulation" means any Department rule or Regulation of general application, whether called a "Rule", a "Regulation", an "Article" a "Section", a "Part", or something else.

The requirement that binding opinions from the Department must be in writing means taxpayer cannot rely on verbal advice given and use that as a defense to escape its liability for Use Tax. The reason for the written opinion requirement of 130.1001 is to preserve the written opinion from the Department to a taxpayer as documentary evidence that the advice or opinion was actually given. When a taxpayer states that months or years earlier he was orally told something by a Department employee in a conversation, one may not be certain about what was actually said by either party as the speaker may misspeak, the listener may not understand, or the speaker's statement or question may not accurately describe his situation.

As noted above in my analysis of Taxpayer Exhibit No. 5, I have doubts about the alleged verbal statements, and I attach no weight at all to them. Also important here is that while Taxpayer's witnesses identified Mike Barthelme as the alleged declarant, they failed to produce him at the hearing as they easily could have done. 86 Admin. Code ch. I, Sec. 200.145 (b)

Regarding Taxpayer's request for a credit of ROT paid in error against their Use Tax liability, the statutes do not authorize such a credit so I am required to deny this request. The Taxpayer could file for and obtain a claim for credit or refund of such taxes so long as it complies with statutory provisions (Ill. Rev. Stat. ch. 120, pars. 445 and 445a) that include bearing the burden of the tax. In this regard, Taxpayer's request for the use of conditional promissory notes issued to its vendees is

neither authorized by statute or covered by the decision in Central Ill. Light Co. v. Department of Revenue 117 Ill. App. 3d 911 (1983), which only approved the use of unconditional promissory notes for this purpose.

This claim for credit procedure was explained to Taxpayer in a March 6, 1990 letter from the Department's legal services bureau (see copy in Department Ex. No. 2, pp. 54-56) but Taxpayer at hearing acknowledged that while they understood the claim for credit procedure, they chose not to follow it. (Tr. pp. 60-61).

Taxpayer states in their Brief (p.7) that assessment of the Use Tax against it would constitute double taxation, and in support cite the four qualifying conditions as stated in Illinois case law, one of which is two taxes assessed for the same purpose. That is not true here as the Use Tax is imposed on a purchaser's acquisition of tangible personal property at retail for use or consumption. The right to exercise an incident of ownership over the property, such as leasing it, subjects it to the Use Tax. The Retailers' Occupation Tax is imposed upon the gross receipts received by a retailer when he sells the tangible personal property at retail for use or consumption and is complementary to the Use Tax because the registered Illinois retailer is required to collect the Use Tax from its customer and remit to the Department. See Ill. Rev. Stat. ch. 120, pars 439.8 and 439.9; 86 Admin. Code ch. I, Sec. 150.901. In this manner the registered retailer reimburses itself for its corresponding ROT liability. Therefore there is no double taxation here on the same initial purchase transaction where Taxpayer's purpose was to acquire the item for its rental inventory. When Taxpayer later sold rental merchandise items at retail, it properly incurred ROT liability as these transactions are not occasional sales because Taxpayer acts as a retailer as well as a lessor, and the auditor did not assess Use Tax upon the amount of merchandise sold by Taxpayer, which in effect allowed the resale deduction for their purchase.

(Tr. pp. 34-35).

The improperly collected tax here is upon rental receipts, and although the Department explained to Taxpayer the available mechanism to recover it, Taxpayer chose not to do so. (Tr. 60-61).

In summary, I find the Taxpayer has not overcome the prima facie case of the Department and I recommend the NTL stand as issued.

RECOMMENDATION Based upon my findings and conclusions as stated above, I recommend the Department finalize NTL No. XXXXX in its entirety and issue a Final Assessment.

Karl W. Betz
Administrative Law Judge

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1. This and subsequent statutory citations are those in effect during the audit period.